IN THE SUPREME COURT OF THE UNITED STATES

---------- TERM, ----

No. 77-1793

CITY OF WARREN and COUNCIL OF THE CITY OF WARREN, themselves and for all of the inhabitants and owners of real property in the City of Warren,
Petitioners,

vs.

MICHAEL J. KELLY, DONALD E. HOLBROOK and LOUIS D. McGREGOR, Judges of the Michigan Court of Appeals,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF WARREN and COUNCIL OF THE CITY OF WARREN, themselves and for all of the inhabitants and owners of real property in the City of Warren,
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MICHAEL J. KELLY, DONALD E. HOLBROOK and LOUIS D. McGREGOR, Judges of the Michigan Court of Appeals,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on March 22, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals below (see Appendix C, p. 24) was not reported. The opinion of the District Court below (see Appendix A, pp. 19-22) was not reported.

JURISDICTION

The judgment of the Court below (see Appendix B, p. 23) was entered on March 22, 1978. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Federal District Court has original 28 U.S.C. §1343(3) subject matter jurisdiction of the plaintiffs' 42 U.S.C. §1983 suit alleging that the defendants, on January 7, 1976, committed fraudulent federal deprivation conduct by "manufacturing" a lower court opinion to grant themselves jurisdiction over the matter, thus depriving the plaintiffs of their right to a fair trial in a fair tribunal and, their due process and equal protection rights guaranteed by the Fourteenth Amendment of the United States Constitution.

2. If the District Judge erred in dismissing for lack of jurisdiction but intended sua sponte to dismiss on the merits of an unasserted 'res judicata' defense, whether the plaintiffs are entitled of right to remand to the District Court for an evidentiary hearing, or whether they are barred from prosecuting their §1983 suit as pleaded because, as construed below, they supposedly already litigated the same suit in a state court and merely seek to relitigate in the District Court a claim of January 7, 1976, fraudulent federal deprivation conduct by the defendants which the defendants, themselves, adjudicated the same day.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fourteenth Amendment, United States Constitution which provides:

> "§ 1. Citizenship rights not to be abridged by states
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within is jurisdiction the equal protection of the laws."

2. The Statute under which Petitioner invoked the jurisdiction of the Federal District Court was the Civil Rights Jurisdiction Statute, 28 U.S.C. Sect. 1343(3) which provides as follows:

> "§ 1343. Civil rights and elective franchise
>
> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [42 USCS § 1985];
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or

usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

3. The Statute under which a cause of action was pleaded by the Petitioner in the Federal District Court was 42 U.S.C. Sect. 1983, which provides as follows:

"Section 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

4. The Statutes under which the Petitioner sought relief in the Federal District Court was 28 U.S.C. §§ 2201 and 2202, which provide as follows:

"§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USCS § 7428], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

"§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

STATEMENT OF THE CASE

May 11, 1976, the plaintiffs commenced their 42 U.S.C. § 1983 suit below by the filing of the complaint against the defendants asserting in the first paragraph:

"1. Jurisdiction in this suit is grounded upon 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (3), and plaintiffs also claim certain declaratory and subsequent relief pursuant to 28 U.S.C. §§ 2201 and 2202."

May 11, 1976, plaintiffs also filed their Rule 36 request of the defendants to admit facts and genuineness of documents including requests to admit facts numbered 15 through 20 which provided:

"15. Plaintiffs request defendants to admit the fact that said circuit judge, in signing and entering the Exhibit A and B order annexed to the complaint in this action, did not base his said 'action on the alleged unconstitutionality of the State Construction Code Act as an unlawful delegation of legislative power.'

"16. Plaintiffs request defendants to admit the fact that the following questions of law were not 'framed' for the 'consideration' of the defendants: (1) whether the delegation of legislative power to the State Construction Code Commission was invalid and unconstitutional, and (2) whether the Code promulgated by the Commission was an invalid and unconstitutional delegation of legislative power because a part of a private nationally recognized model building code was incorporated by reference therein.

"17. Plaintiffs request defendants to admit the fact that said circuit judge did not rely upon *King* v. *Concordia Fire Insurance Co.*, 140 Mich. 258 (1905) in granting, signing and entering the Exhibits A and B orders annexed to the complaint in this section.

"18. Plaintiffs request defendants to admit the fact that said circuit Judge did not make a preliminary determination that the State Construction Code Act of 1972 makes an unlawful delegation of legislative power to the State Construction Code Commission in granting, signing and entering the Exhibit A and B orders annexed to the complaint in this action.

"19. Plaintiffs request defendants to admit the fact that said circuit judge did not 'observe' that the 'power to promulgate substantive rules is essentially the power to make law.'

"20. Plaintiffs request defendants to admit the fact that said circuit judge did not 'hold' that 'pursuant to *King* v. *Concordia* the State Construction Code Act, which purports to delegate to the Commission the power to establish substantive construction standards, is an unconstitutional delegation of legislative power."

May 13, 1976, the plaintiffs' complaint and Rule 36 requests were served by a Marshal.

June 2, 1976, the defendants filed their Rule 12(b)(6) motion to dismiss asserting the defense that the plaintiffs had failed to state a claim upon which relief could be granted.

June 25, 1976, the plaintiffs filed their answer to the defendants' Rule 12(b)(6) motion to dismiss.

The defendants did not deny any of the plaintiffs' Rule 36 requests to admit facts and genuineness of documents, including requests numbered 15 through 20.

June 29, 1976 (more than 45 days after plaintiffs' Rule 36 requests were served), plaintiffs filed their amended complaint incorporating by reference all the averments of

their complaint commencing the § 1983 suit below, adding paragraph 10A alleging operative facts of material misrepresentation conduct by the defendants under color of state law such as to constitute a fraud upon the plaintiffs and subjecting them to a federal deprivation, and requesting the same following relief as requested in the original complaint:

> "A. That the Court declare and adjudge that the defendants, acting under color of state law, deprived the plaintiffs of due process of law as guaranteed by the Due Process Clause of the Fourteenth Amendment.
>
> "B. That the Court declare and adjudge that the defendants, acting under color of state law, deprived the plaintiffs of the equal protection of laws as guaranteed by the Equal Protection Clause of the Fourteenth Amendment.
>
> "C. That the Court grant plaintiffs such subsequent relief as may be appropriate, pursuant to 28 U.S.C. § 2202, and such other and further equitable relief as may be necessary."

July 6, 1976, the District Court heard the defendants' Rule 12(b)(6) motion to dismiss as noticed.

July 6, 1976, defendants by counsel orally suggested that the plaintiffs were attempting to appeal a state court decision and that the District Court had no appellate jurisdiction (Tr., 5).

August 24, 1976, the District Judge simultaneously filed his August 19, 1976 memorandum opinion and order (Appendix A, pp. 19-20) summarily dismissing plaintiffs' § 1983 suit with prejudice for lack of jurisdiction.

February 15, 1978, the Sixth Circuit Court of Appeals heard the plaintiffs' appeal of the District Court's order dismissing the plaintiffs' case for lack of jurisdiction.

March 22, 1978, the Sixth Circuit Court of Appeals filed its order that the judgment of the District Court be af-

firmed. The Court of Appeals cited the reasons set forth in the memorandum opinion of District Judge Charles W. Joiner filed on August 24, 1976 as the basis of their opinion.

In addition to the statutory existence of § 1343(3), the only facts relevant to the first jurisdictional issue presented for review are the undisputed facts alleged in the plaintiffs' amended complaint wherein plaintiffs (a) asserted original District Court subject matter jurisdiction as provided by § 1343(3), (b) asserted a particular substantive § 1983 claim of fraudulent trial by ambush federal deprivation conduct by defendants occurring on January 7, 1976, (c) invoked the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, and (d) requested only certain redress without seeking to have the District Court declare any state judgment null and void or otherwise reverse, set aside, vacate or modify any state judgment.

The facts relevant to the contingent second 'res judicata' issue presented for review are:

(a) the defendants did not plead or otherwise assert any res judicata or collateral estoppel defense;

(b) the defendants offered no testimonial, record or other evidence in support of any affirmative res judicata or collateral estoppel defense;

(c) no fact is alleged or contained in the plaintiffs' pleadings or exhibits disclosing to the District Judge evidence to support a sua sponte 'res judicata' or 'collateral estoppel' determination, if so intended by him;

(d) the "brief" referred to in the District Judge's memorandum opinion (Appendix A, pp. 20-21) was filed by plaintiffs in the Michigan Court of Appeals on April 23, 1975 as appellees in *City of Warren* v. *State Construction Code Commission*, 66 Mich. App. 493 (January 7, 1976),

more than eight months before the January 7, 1976 fraudulent federal deprivation conduct alleged in their § 1983 amended complaint below; and

(e) the plaintiffs did not have, and the District Judge did not afford them, any opportunity below to plead or to offer evidence or even to argue in opposition to a sua sponte 'res judicata' or 'collateral estoppel' determination, if so intended by the District Judge.

REASONS FOR GRANTING THE WRIT

I

For the statutory basis or original subject matter jurisdiction in this action before the Federal District Court, the plaintiffs pleaded their reliance upon 28 U.S.C. § 1343(3), the Civil Rights Jurisdiction Statute. That statute gives original jurisdiction of any civil action authorized by law.

42 U.S.C. § 1983 authorizes one such type of civil action where a person is subjected to the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ."

The plaintiffs submit that it was twice erroneous adbication of jurisdictional duty for the District Court to dismiss the plaintiffs' § 1983 suit with prejudice, for "lack of jurisdiction" because § 1343(3) plainly provides otherwise and because the plaintiffs' amended complaint plainly alleges a § 1983 suit in equity requesting only the following relief:

> "A. That the Court declare and adjudge that the defendants, acting under color of state law deprived the plaintiffs of due process of law as guaranteed by the Due Process Clause of the Fourteenth Amendment.
>
> "B. That the Court declare and adjudge that the defendants, acting under the color of state law, deprived

the plaintiffs of the equal protection of laws as guaranteed by the Equal Protection Clause of the Fourteenth Amendment.

"C. That the Court grant plaintiffs such subsequent relief as may be appropriate, pursuant to 28 U.S.C. § 2202, and such other and further equitable relief as may be necessary."

Mr. Justice Stewart, speaking for the Supreme Court in *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972), said:

"... The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or *judicial*.' *Ex parte Virginia*, 100 U.S. at 346, 25 LEd at 679."

The plaintiffs in this case are alleging a violation of their federal rights by *judicial* action in a state court; more specifically, that the defendants denied the plaintiffs their fundamental rights to a fair trial in a fair tribunal as guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

The plaintiffs charge that the defendants, in effect, "manufactured" a Michigan Circuit Court case opinion, in an attempt to hide the fact that they were attempting to exercise "original jurisdiction" in the matter. That this is so, the plaintiffs refer the Court to the plaintiffs' FRCP Rule 36 "Request to Admit Facts" filed on May 11, 1976, which admissions were added to plaintiffs' complaint by amendment on June 29, 1976 when the defendants failed to respond to the request within forty-five days.

The plaintiffs did go to the Michigan Supreme Court to request a writ of superintending control. That Court refused to issue such a writ stating that it would be "inappropriate." The plaintiffs in their complaint for a writ of superintending control stated that they had another "plain, speedy and adequate remedy by bringing a federal action for equitable relief against the Judges pursuant to 42 U.S.C. 1983 . . ." Michigan General Court Rule 711.2 provides:

"The order of superintending control should not be issued if another plain, speedy and adequate remedy is available . . ."

Obviously the Michigan Supreme Court agreed that we had another adequate remedy. The plaintiffs, therefore, filed their § 1983 action in the United States District Court.

District Court Judge Joiner found that the plaintiffs' suit must be dismissed for lack of jurisdiction. This was in response to an oral motion by defendants to dismiss for lack of jurisdiction. It is interesting to note that the defendants had previously made a written FRCD 12(b)(6) motion raising a question of merits and expressly acknowledging that the plaintiffs were bringing their action pursuant to 28 U.S.C. § 1343(3).

District Judge Joiner completely ignored the plaintiffs' reliance upon § 1343 in his opinion granting dismissal and plaintiffs would argue that this constitutes reversible error.

Before deciding to dismiss for lack of jurisdiction a District Court *must* look to the way a complaint is drawn to see if it is drawn so as to claim a right to redress under the Constitution and laws of the United States, for to that extent the party who brings a suit is master to decide what law he relies upon and determines whether he will bring a suit arising under the Constitution or laws of the United States by his complaint. See *Bell* v. *Hood*, 327 U.S. 678 at 681.

In 1 Moore's Federal Practice, § .60, at 631 says:

> "*Bell* v. *Hood* ruled that the plaintiff may determine on what theory he will pitch his claim — what law he will rely on. If he decides to rely on federal law and his claim based on that law is not frivolous or sham but in an orderly statement a right of immunity created by the Constitution or laws of the United States appears as an essential element, then jurisdiction is well founded, and judgment for or against the plaintiff should be on the merits."

In this case, the District Court Judge ignored the way in which the plaintiffs had drawn their complaint, but instead adopted the defendant's "theory" as to what the plaintiff "really wanted to achieve."

The District Court Judge found that the plaintiffs were attempting an appeal and dismissed on the ground that there is no "appellate" jurisdiction in a federal district court.

This conclusion is incorrect for several reasons. First, the relief requested by the plaintiffs in the District Court is not the kind that would be requested if this were indeed an "appeal." The plaintiffs do *not* seek to have any state court judgment declared null and void, or otherwise overturned, or enjoined by mandatory injunction or mandamus or otherwise.

And second, in order to be an appeal there must be a lower court "decision" that is sought to be reversed. There is none in this case. District Court Judge Joiner extracted language from the plaintiffs' brief submitted to the Michigan Court of Appeals where the plaintiffs argued that an original adjudication by the Michigan Court of Appeals would constitute state action denying the plaintiffs their fundamental rights to a fair trial in a fair tribunal as guaranteed by Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

The District Judge concluded:

> ". . . In this case, the federal constitutional issue was presented to the Michigan Court of Appeals by plaintiffs. When the Michigan Court of Appeals dismissed the complaint it necessarily decided and ruled against plaintiffs on the Constitutional question raised on appeal."

This is error for several reasons. First, when plaintiff suggested such a constitutional issue to the Michigan Court of Appeals, there had not been at that point any "*conduct*" by the defendants which would have been actionable under § 1983.

Second, it would be unthinkable to suggest that the defendants *did or could* adjudicate their *own* fraudulent federal deprivation conduct.

And third, the admission by the defendants that their January 7, 1976 judgment in pertinent part was void for want of jurisdiction.

II

Although ambiguous as to essential intention, on balance we construe the essence of the District Court's 'lack of jurisdiction' dismissal to be grounded on an intended sua sponte res judicata determination. The District Court cites four cases in support of its decision.

Deane Hill Country Club, Inc. v. *City of Knoxville,* 379 F2d 321, 323 (6 Cir. 1967) and *Grubb* v. *Public Utilities Commission,* 281 U.S. 470 (1929), two of the cases cited by the District Court, are both cases, in pertinent part, applying res judicata principles with precision, with notice to the parties, with opportunity to be heard, and with pertinent citation of supporting authorities.

Neither *Deane Hill* nor *Grubb* supports the 'lack of jurisdiction' dismissal below and both are jurisdictionally

inapposite to the other two cases cited by the District Judge, namely: *Brown* v. *Chastain*, 416 F2d 1012 (5 Cir. 1969), cert. denied, 397 U.S. 1065 (1969), and *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923).

Whereas, in pertinent part, *Deane Hill* is grounded upon the res judicata authority of *Grubb* and precise res judicata plea, notice, hearing and fact determination, *Chastain* is grounded upon the 'appellate' jurisdiction authority of *Rooker*.

An extensive dissenting opinion in *Chastain* took serious issue with the majority opinion's reliance upon *Rooker* on the narrow 'appellate' jurisdiction issue as framed and decided in the majority opinion.

As a matter of total anomaly, the majority *Chastain* opinion subsequently (at p. 1014) cites *Deane Hill* as authority and quotes *Deane Hill res judicata* language wholly unrelated to the *appellate* jurisdictional issue as framed and determined by the majority of the *Chastain* panel; and nowhere in the majority *Chastain* opinion is § 1343(3) even mentioned although relied upon by both the plaintiffs and the District Judge.

Chastain doesn't square at all with the unanimous Fifth Circuit panel decision in *Mack* v. *Florida State Board of Dentistry*, 296 F. Supp. 1259 (S.D. Fla. 1969), aff'd in part and vacated in part on non-jurisdictional grounds, 430 F2d 862 (5 Cir. 1970); cert. denied, 401 U.S. 954 and 401 U.S. 960 (1971); and only months after *Chastain* (August, 1969), another Fifth Circuit panel in *Paul* v. *Dade County, Florida*, 419 F2d 10 (5 Cir. November, 1969), cert. denied, 397 U.S. 1065 (1970), modified *Chastain* at least in part without even citing or attempting to apply *Rooker* as actually decided.

We construe *Rooker* as good (and even quotable) authority for a generalized self-evident proposition that a District Court is possessed of only original and not appellate juris-

diction; but, we submit, that that particular negative *Rooker* proposition can only be applied in the light of the following extremely narrow conclusion of the Supreme Court in the *Rooker* case as actually decided (at p. 414):

> "This is a bill of equity to have a judgment of a circuit court in Indiana, which was affirmed by the supreme court of the state, declared null and void, and to obtain other relief dependent on that outcome."

The *Deane Hill/Grubb* (res judicata) decisions and the *Chastain/Rooker* (lack of 'appellate' jurisdiction) decisions are mutually exclusive in import because the former are decisions of merits depending upon mixed fact-law questions whereas the latter are decisions of jurisdiction depending upon uniquely pleaded and uniquely construed requests for appellate relief in District Courts of original jurisdiction.

In the plaintiffs' § 1983 suit, as pleaded, neither *Rooker* nor the majority *Chastain* opinion has any realistic application because the plaintiffs invoked the original subject matter jurisdiction of the District Court as plainly provided by § 1343(3) and do not in their amended complaint seek to have any state court judgment declared null and void (*Rooker*) or otherwise overturned or enjoined by mandatory injunction or mandamus (*Chastain*) or otherwise.

We submit that the disparate, incongruous and irreconcilable opinions of the Second Circuit panel in *Tang* v. *Appellate Division of the New York Supreme Court, First Department*, 487 F2d 138 (2 Cir. 1973), cert. denied, 84 S. Ct. 1611 (1974), exemplifying the troubling difficulties of a res judicata variation of what we capsulate as the District Court's '*Rooker*-collateral estoppel contradiction'.

As disclosed in the memorandum opinion (Appendix A, p. 19), the five stair-step elements of the District Court's *Rooker*-collateral estoppel contradiction are stated sequentially by the District Judge.

First, the District Judge says (Appendix A, p. 20): "For reasons discussed below, this Court is of the opinion that this suit must be dismissed for lack of jurisdiction." At this first step, the District Judge does not reveal if he is of the opinion that the plaintiffs' suit must be dismissed for lack of original subject matter jurisdiction or for lack of 'appellate' jurisdiction as decided in *Rooker, supra.*

Second, the District Judge says (Appendix A, p. 21): "The defendants have moved to dismiss the complaint (sic) on the ground that this court lacks jurisdiction to hear this matter." At this second step, the District Judge overlooks the defendants' incompatible Rule 12(b)(6) motion as filed and selectively entertains their July 6, 1976 oral motion to dismiss the plaintiffs' amended complaint for 'lack of jurisdiction' without a distinction yet made by the District Judge between original subject matter jurisdiction or 'appellate' jurisdiction as decided in *Rooker, supra.*

Third, the District Judge says (Appendix A, p. 22): "In this case the federal constitutional issue was presented to the Michigan Court of Appeals by plaintiffs. When the Michigan Court of Appeals dismissed the complaint, it necessarily decided and ruled against plaintiffs on the constitutional question raised on appeal. This is so even though the Michigan Court of Appeals' decision does not discuss the issue. *Grubb* v. *Public Utilities Commission*, 281 U.S. 470 (1929)." At this crucial third step, we believe, the District Judge intended to make, and did make, a sua sponte collateral estoppel/issue preclusion determination. It was a crucial sua sponte determination of a question of merits because (1) it contradicts the District Judge's first-step opinion that the plaintiffs' suit must be dismissed for "lack of jurisdiction", (2) it is incompatible with the District Judge's second-step construction of the defendants' oral motion to dismiss the plaintiffs'

amended complaint for "lack of jurisdiction", and (3) it prejudicially denied the plaintiffs any opportunity to be heard on a question of merits.

Fourth, the District Court says (Appendix A, pp. 21-22): "Federal courts do not provide a forum in which disgruntled parties can relitigate questions of federal law which have been presented to and decided by state courts. *Brown, supra; Deane Hill Country Club, Inc., supra. See also, Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923)." At this fourth step, the District Judge excerpts *Deane Hill* language (*supra,* at 325) used totally within the context of a carefully considered res judicata opinion by Judge Peck joined by Judge Celebrezze and Judge McAllister.

And fifth, immediately following the aforequoted res judicata language, the District Judge brings his *Rooker*-collateral estoppel contradiction full circle by saying, in conclusion, (Appendix A, p. 22):

> ". . . Plaintiffs' remedy was to appeal the decision of the Michigan Court of Appeals on their federal constitutional issue and, if necessary, to seek review in the United States Supreme Court. To ask the federal district court to entertain this suit is to ask it to exercise appellate jurisdiction over the state courts. The jurisdiction possessed by the federal district courts is strictly original in these matters. *Rooker* v. *Fidelity Trust Co., supra.* Accordingly, the motion to dismiss is granted."

Thus, unless we misread the District Court's memorandum opinion, the District Judge's 'lack of jurisdiction' conclusion is wholly unsupported except by his contradictory erroneous and prejudicial sua sponte determination of an unasserted and supposed affirmative collateral estoppel/issue preclusion defense without notice to the plaintiffs so as to afford them an opportunity to be heard in opposition on the merits.

III

The Court of Appeals panel in this case adopted the memorandum opinion of District Judge Charles W. Joiner filed on August 24, 1976, finding the issues raised by appellants to be without merit. Therefore, Petitioners argue that the Court of Appeals has also erred, as a matter of law.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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PETITIONERS' APPENDICES

APPENDIX A

Memorandum Opinion and Order of District Judge Joiner Filed August 24, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

City of Warren and Council of the City of Warren, themselves and for all of the inhabitants and owners of real property in the City of Warren,
Plaintiffs,
vs.
Michael J. Kelly, Donald E. Holbrook and Louis D. McGregor, Judges of the Michigan Court of Appeals,
Defendants.

Civil Action No. 6-70961

MEMORANDUM OPINION AND ORDER

Plaintiffs have brought this action under 42 U.S.C. § 1983 for declaratory and other appropriate relief alleging that defendants, present or former judges of the Michigan Court of Appeals, acting under color of state law, deprived plaintiffs of their Fourteenth Amendment rights to due process and equal protection. Specifically, plaintiffs allege that they have been denied a fair trial in a fair tribunal.

For reasons discussed below, this court is of the opinion that this suit must be dismissed for lack of jurisdiction.

Factual Background.

On October 18, 1974, the plaintiffs commenced a civil action in the state circuit court against the Michigan State Construction Code Commission (the "'Commission") and the County of Macomb. The complaint alleged that certain sections of the Michigan State Construction Act of 1972, M.C.L.A. § 125.1501 et seq. (the "Act"), made an unlawful delegation of legislative power to the Commission and therefore was unconstitutional under the Michigan Constitution. On October 24, 1974, the state circuit court entered a temporary restraining order exempting the City of Warren from the operation of the Act and temporarily restraining and enjoining the defendants from enforcing the Act against the City of Warren. On November 25, 1974, the circuit court issued a second temporary restraining order. On October 31, 1974, in response to the first temporary restraining order, and on November 4, 1974, in response to the second temporary restraining order, the Commission filed an application for emergency leave to appeal and a motion for immediate consideration in the Michigan Court of Appeals, alleging that the speedy resolution of this issue was essential due to the importance of this legislation to the health, safety and welfare of the people of Michigan. The Commission sought an adjudication of this suit on the merits quickly because the effective date of the Act was November 6, 1974. On November 27, 1974, the court of appeals granted the Commission's application and motions and stayed the proceedings in the state circuit court.

In its brief submitted to the Michigan Court of Appeals in this matter, plaintiffs argued that "an original adjudication by this Court of Appeals . . . will constitute state

action denying the plaintiffs-appellees their fundamental rights to a fair trial in a fair tribunal as guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution." In a decision dated January 7, 1976, the Michigan Court of Appeals reversed the grant of the temporary injunction in the circuit court and dismissed the complaint without discussing plaintiffs' federal constitutional arguments, 66 Mich. App. 493. On April 26, 1976, the Michigan Supreme Court dismissed plaintiffs' complaint for an order of superintending control as inappropriate. Plaintiffs now bring this action in federal district court against the named present or former judges of the Michigan Court of Appeals who comprised the panel that decided plaintiffs' case in that court. The claim is that these judges, acting under color of state law, have denied plaintiffs their Fourteenth Amendment right to a fair trial in a fair tribunal the circuit court. The defendants have moved to dismiss the complaint on the ground that this court lacks jurisdiction to hear this matter.

Discussion of Law.

State courts are competent to decide issues of federal constitutional law. *Brown* v. *Chastain*, 416 F.2d 1012 (5th Cir. 1969); *Deane Hill Country Club, Inc.* v. *City of Knoxville*, 379 F.2d 321 (6th. Cir. 1967). In this case, the federal constitutional issue was presented to the Michigan Court of Appeals by plaintiffs. When the Michigan Court of Appeals dismissed the complaint, it necessarily decided and ruled against plaintiffs on the constitutional question raised on appeal. This is so even though the Michigan Court of Appeals' decision does not discuss this issue. *Grubb* v. *Public Utilities Commission*, 281 U.S. 470 (1929).

Federal courts do not provide a forum in which disgruntled parties can relitigate questions of federal law

which have been presented to and decided by state courts. *Brown, supra; Deane Hill Country Club, Inc., supra. See also, Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923). Plaintiffs' remedy was to appeal the decision of the Michigan Court of Appeals on their federal constitutional issue and, if necessary, to seek review in the United States Supreme Court. To ask the federal district court to entertain this suit is to ask it to exercise appellate jurisdiction over the state courts. The jurisdiction possessed by the federal district courts is strictly original in these matters. *Rooker* v. *Fidelity Trust Co., supra.* Accordingly, the motion to dismiss is granted.

So ordered.

(s) Charles W. Joiner
United States District Judge

Dated: August 19, 1976
Detroit, Michigan

APPENDIX B

Judgment of District Court Entered August 24, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF WARREN and COUNCIL OF THE CITY OF WARREN, themselves and for all of the inhabitants and owners of real property in the City of Warren,
Plaintiffs,
vs.
MICHAEL J. KELLY, DONALD E. HOLBROOK and LOUIS D. McGREGOR, Judges of the Michigan Court of Appeals,
Defendants.

Civil Action
No. 6-70961

JUDGMENT

The defendants' motion to dismiss came on for hearing before the court, Honorable Charles W. Joiner, United States District Judge, presiding, and the issues having been heard and a decision rendered in a Memorandum Opinion and Order dated August 19, 1976.

IT IS ORDERED AND ADJUDGED that the case be dismissed with prejudice.

Dated at Detroit, Michigan, this 19th day of August, 1976.

Henry R. Hanssen
Clerk of the Court

By (s) Sharon M. Bruley
Deputy Clerk

Approved as to form:

(s) Charles W. Joiner

APPENDIX C

Order of the Sixth Circuit Court of Appeals

76-2446

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CITY OF WARREN and COUNCIL OF THE CITY OF WARREN, et al,
Plaintiffs-Appellants,

vs.

MICHAEL J. KELLY, DONALD E. HOLBROOK and LOUIS D. McGREGOR, Judges of the Michigan Court of Appeals,
Defendants-Appellees.

ORDER

Before: WEICK, CELEBREZZE and ENGEL, Circuit Judges

Plaintiffs appeal from a judgment of the district court dismissing their civil rights action, purportedly filed under 42 U.S.C. §1983 and 28 U.S.C. §1343(3), against three judges of the Michigan Court of Appeals. For the reasons set forth in the memorandum opinion of District Judge Charles W. Joiner filed on August 24, 1976, the court is of the opinion that the issues raised by appellants are altogether without merit. Accordingly,

IT IS ORDERED that the judgment of the district court is hereby affirmed.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977
No. 77-1793

CITY OF WARREN AND COUNCIL OF THE CITY OF WARREN, themselves and for all of the inhabitants and owners of real property in the City of Warren,

Petitioners,

vs

MICHAEL J. KELLY, DONALD E. HOLBROOK, and LOUIS D. McGREGOR, Judges of the Michigan Court of Appeals,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Respondents, Judges of the Michigan Court of Appeals, accept Petitioners' statement of the opinions below.

JURISDICTION

Respondents, Judges of the Michigan Court of Appeals, accept Petitioners' statement of jurisdiction.

QUESTION PRESENTED

Whether the United States District Court for the Eastern District of Michigan had jurisdiction over civil rights action under 42 USC § 1983 seeking to challenge the validity of a judgment of the Michigan Court of Appeals?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions quoted in the Petition, this case involves the following portions of the Michigan General Court Rules:

GCR 1963, 853.1:

"Grounds. Appeal may be taken to the Supreme Court only upon application and leave granted, in the discretion of the Supreme Court, from any decision of the Court of Appeals, interlocutory or final, upon a showing of a meritorious basis for appeal and any one of the following grounds.

"(1) The subject matter of the appeal involves legal principles of major significance to the jurisprudence of the State.

"(2) The decision of the Court of Appeals is clearly erroneous and will cause material injustice.

"(3) The decision is in conflict with decisions of the Supreme Court or other Court of Appeals decisions.

"(4) In any appeal of an interlocutory order of the Court of Appeals, it must be shown that appellant would suffer substantial harm by awaiting final judgment before taking appeal."

GCR 1963, 862.5(a):

"An original action for superintending control in the nature of mandamus or prohibition may be filed in the Supreme Court to implement the superintending or supervisory control power of the Supreme Court over the Court of Appeals, where an application for leave to appeal cannot properly be filed."

STATEMENT OF THE CASE

On October 18, 1974, Petitioners commenced a civil action in the state circuit court against the Michigan State Construction Code Commission and the County of Macomb alleging that certain sections of the Michigan Construction Code Act of 1972 (MCLA § 125.1501, *et seq*; MSA 5.2949(1), *et seq*) constituted an unlawful delegation of legislative power to the Commission and violated the Michigan Constitution. Subsequently the state circuit court entered two temporary restraining orders exempting the City of Warren from the operation of the act and temporarily restraining and enjoining the Commission and the County from enforcing the act against the City of Warren. The Commission filed an application for emergency leave to appeal to the Michigan Court of Appeals and a motion for immediate consideration, and on November 27, 1974, the Michigan Court of Appeals granted the Commission's application and motion and stayed the proceedings in the state circuit court.

In its brief in the Michigan Court of Appeals Petitioners argued, *inter alia*, that adjudication of the case by the Court of Appeals would deprive Petitioners of their rights to a fair trial in a fair tribunal as guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

In its decision the Michigan Court of Appeals reversed the grant of the temporary injunction in the circuit court and dismissed the complaint. *City of Warren* v *State Construction Code Commission*, 66 Mich App 493, 239 NW2d 640 (1976). Pursuant to Michigan General Court Rules, GCR 1963, 853.1, an appeal may be taken to the Michigan Supreme Court only upon application and leave granted in the discretion of the Supreme Court from any decision of the Court of Appeals. Petitioners did not file an application for leave to appeal from the decision of the Michigan Court of Appeals but filed a complaint for a writ of superintending control in the Supreme Court, GCR 1963, 862.5, seeking to vacate the decision of the Court of Appeals. On April 26, 1976, the Michigan Supreme Court dismissed the complaint for an order of superintending control as inappropriate under the court rule.

Petitioners brought a civil rights action pursuant to 42 USC § 1983 against the members of the panel of the Michigan Court of Appeals which decided the case, alleging that their decision violated Petitioners' constitutional rights. Pursuant to Respondents' motion, the United States District Court for the Eastern District of Michigan dismissed the complaint for lack of jurisdiction. That dismissal was affirmed on appeal to the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

THE PETITION PRESENTS NO IMPORTANT QUESTIONS OF FEDERAL LAW WHICH MUST BE DECIDED BY THIS COURT SINCE THE DECISION BELOW IS CLEARLY CORRECT AND IS NOT IN CONFLICT WITH OTHER DECISIONS OF THIS COURT.

Petitioner's complaint in the district court alleged that Respondents, present and former judges of the Michigan Court of Appeals, violated Petitioners' constitutional rights when they issued the decision in *City of Warren* v *State Construction Code Commission, supra*, 66 Mich App 493. The prayer for relief in the complaint, and the amended complaint, requested a declaration that the Respondents had deprived Petitioners of due process of law and the equal protection of laws and further requested "such subsequent relief as may be appropriate, pursuant to 28 USC § 2202, and such other and further equitable relief as may be necessary."

Although ostensibly filed against the individual judges comprising the panel which decided the case, it is readily apparent that the complaint filed in the district court is nothing more than a thinly disguised attempt to attack the validity of the *judgment* of the Michigan Court of Appeals. Although the prayer for relief does not, in so many words, seek to prevent the enforcement of the Michigan Court of Appeals judgment, that is indisputably the goal of this litigation. What possible purpose would be achieved by a declaration that Petitioners' rights were violated by the Court of Appeals judgment unless the enforcement of that judgment was prevented? Although Petitioners attempted to carefully draw their complaint in such a manner as to give the appearance of suing the judges

rather than the judgment, the District Court saw through this subterfuge and correctly concluded that Petitioners were, in effect, attempting to appeal to the United States District Court from the decision of the Michigan Court of Appeals. As concluded by the District Court and affirmed by the Court of Appeals, such an action is clearly improper and the District Court was without jurisdiction to entertain the case.

Although not specifically mentioned in the Michigan Court of Appeals decision, *City of Warren* v *State Construction Code Commission*, *supra*, 66 Mich App, the constitutional question at issue here was presented to the Court and must be deemed to have been conclusively decided against Petitioners:

> "In the opinion of the state court there is no express mention of the constitutional grounds upon which the appellant asked a reversal of the order . . . and from this it is argued that the constitutional validity of the order was not determined, and therefore as to that matter the judgment is not *res judicata*. But the argument is not sound. The question of the constitutional validity of the order was distinctly presented by the appellant's position and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it." *Grubb* v *Public Utilities Commission of Ohio*, 281 US 470, 477-478 (1930).

The appropriate remedy for Petitioners' dissatisfaction with the decision of the Michigan Court of Appeals was by way of application for leave to appeal to the Michigan Supreme Court and, perhaps, review by this Court. Instead of pursuing these remedies, Petitioners attempted to challenge the validity of the Michigan Court of Appeals decision in the United States

District Court. It is axiomatic that the United States District Courts have no jurisdiction to entertain such an action:

> "If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. [citations omitted] Under the legislation of congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. [citation omitted] To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the district courts is strictly original." *Rooker* v *Fidelity Trust Co*, 263 US 413, 415-416 (1923).

In *Brown* v *Chastain*, 416 F2d 1012 (CA 5, 1969), *cert den*, 397 US 951 (1970), the plaintiffs were unsuccessful in the state court in their attempt to obtain a free transcript for a civil appeal and thereafter unsuccessfully attempted to relitigate the issue in the federal courts:

> "It is obvious from the complaint and the requested relief that the appellants are here attempting to relitigate their federal constitutional claim by obtaining a form of direct federal court review of the state decisions, since independent equitable proceedings to prevent the enforcement of a judgment are considered a direct attack upon it. See Restatement, Judgments, § 11, comment a (1942). The District Court was patently without jurisdiction to

engage in such a review." *Brown* v *Chastain, supra,* 416 F2d at 1013.

Similarly, in *Atchley* v *Greenhill,* 517 F2d 692 (CA 5, 1975), *cert den* 424 US 915 (1976), the Court of Appeals affirmed the dismissal, for lack of jurisdiction, of an action against a state trial judge and state Supreme Court justices under the Civil Rights Act seeking a declaration that state court judgments were void and seeking an injunction expunging the state judgment records and reinstating the case on the docket.

Petitioner argues that the District Judge confused the question of jurisdiction with the issue of the *res judicata* effect of the state court decision. A plain reading of the district court opinion indicates the contrary but in any event it is clear that the judgment of dismissal was proper since, in the words of the Court of Appeals (Petition, page 24), "the issues raised by appellants are altogether without merit." The record of the instant case indicates that dismissal is proper, whether on grounds of lack of jurisdiction, *res judicata,* lack of merit in the grounds presented, or immunity of the Respondents, see *Pierson* v *Ray,* 386 US 547 (1967); *Stump* v *Sparkman,* .... US ...., 55 L Ed 2d 331 (1978). The judgment of dismissal is clearly correct and is not in conflict with any other decisions of this Court, and it is apparent that this case presents no important questions of federal law which must be settled by this court.

CONCLUSION

For the foregoing reasons it is requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Dated: July 13, 1978